Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 00-111966

Employee: Thomas Brookes

Employer: Stephens Floor

Insurer: American Manufacturers Mutual

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Date of Accident: Alleged October 6, 2000

Place and County of Accident: Alleged St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla O. Boresi, issued July 18, 2005, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED
William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the companion case, Injury No. 03-109225, was assigned to the law firm

for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case or in Injury No. 03-109225 until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

_____

William F. Ringer, Chairman

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge concluded that the three-year claim filing period of § 287.430 RSMo does not apply in this instant case. The administrative law judge concludes that employer's failure to include all of the statutorily required information in its report of injury did not trigger the three-year filing period. I disagree.

Workers' compensation law is entirely a creature of statute, and when interpreting the law, we must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms and give effect to that intent if possible. *Pierson v. Treasurer of Mo. As Custodian of the Second Injury Fund*, 126 S.W.3d 386, 390 (Mo. 2004). A review of the relevant statutes makes clear the administrative law judge erred.

Section 287.430 RSMo provides:

> [N]o proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. (Emphasis added).

As I understand employer's argument, employer urges us to read the statute as triggering the three-year statute of limitations only if employer fails to deliver some document purporting to be a report of injury. That is, employer urges us to accept that, although § 287.380 contains many requirements, the legislature only intended to refer to the requirement of physical delivery when it included the phrase "as required by section 287.380…," in § 287.430. I reject employer's invitation to read the phrase so narrowly.

So, what does § 287.380 require? Section 287.380.1 RSMo provides:

> Every employer or his insurer in this state, whether he has accepted or rejected the provisions of this chapter, shall within thirty days after knowledge of the injury, file with the division under such rules and regulations and in such form and detail as the division may require, a full and complete report of every injury or death to any employee for which the employer would be liable to furnish medical aid, other than immediate first aid which does not result in further medical treatment or lost time from work, or compensation hereunder had he accepted this chapter, and every employer or insurer shall also furnish the division with such supplemental reports in regard thereto as the division shall require. All reports submitted under this subsection shall include the name, address, date of birth and

> wages of the deceased or injured employee, the time and cause of the accident, the nature and extent of the injury, the name and address of the employee's and the employer's or insurer's attorney of record, if any, the medical cost incurred in treating the injured employee, the amount of lost work time of the employee as a result of the injury and such other information as the director may reasonably require in order to maintain in the division, accurate and complete data on the impact of work-related injuries on the workers' compensation system. (Emphasis added).

"The use of the word 'shall' in a statute is generally interpreted as mandatory." *Burns v. Elk River Ambulance, Inc.*, 55 S.W.3d 466, 484 (Mo. App. 2001). Pursuant to the plain language of § 287.380, an employer's inclusion of employee wage information in the report of injury is mandatory. Stated another way, inclusion of the employee wage information is a requirement of § 287.380.

This is not a case where employer attempted in good faith to report employee's wage but a typographical error resulted in inaccurate information being transmitted to the Division (e.g. transposition of digits). Rather, in the instant case, employer reported employee earned a wage of $10 per week and employee worked 0 hours per week. These convenient and wholly inaccurate understatements of employee's wage and hour information reveal a complete lack of effort on employer's part to provide accurate information to the Division as required by § 287.380.

Employer's failure to even attempt to provide accurate information in the Report of Injury is tantamount to failing to provide employee's wage at all. Therefore, the report of injury was not filed "as required by section 287.380" and the three-year claim-filing period applies. I conclude that the statute of limitation defense fails. Employee's claim against employer and American Manufacturer's Mutual Insurance Company is timely.

I would reverse the award of the administrative law judge denying compensation. I would issue a temporary award of additional medical treatment. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

_____

John J. Hickey, Member

AWARD

Employee: Thomas Brookes

Dependents: N/A

Employer: Stephens Floor

Additional Party:

Insurer: American Manufacturers Mutual

Hearing Date: May 10, 2005

Injury No.: 00-111966

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Second Injury Fund
Jefferson City, Missouri

Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

2. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: October 6, 2000.

5. State location where accident occurred or occupational disease was contracted: St. Louis County.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? No.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was carrying a heavy roll of material when his co-worker dropped one end, causing Claimant's upper body to be jerked backwards.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Right upper extremity.

14. Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: $0.

16. Value necessary medical aid paid to date by employer/insurer? $3,318.30

17. Value necessary medical aid not furnished by employer/insurer? $0

18. Employee's average weekly wages: Maximum.

19. Weekly compensation rate: $599.96 / $314.26

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: None.

22. Second Injury Fund liability: No

TOTAL: -$0.00-

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of –0- of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John J. Larsen, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas Brookes

Dependents: N/A

Employer: Stephens Floor

Additional Party:

Insurer: American Manufacturers Mutual

Injury No.: 00-111966

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Second Injury Fund

Checked by: KOB

PRELIMINARIES

The matter of Thomas Brookes ("Claimant") proceeded to hearing to determine which, if any, insurance company is responsible to provide medical benefits to Claimant for a right shoulder injury. Two separate claims alleging different theories were tried simultaneously. Attorney John Larsen represented Claimant. Attorney Juan Arias represented Stephens Flooring Company, Inc. ("Employer") in Injury Number 00-111966 (date of injury October 6, 2000), and Insurer, American Manufacturers. Attorney Kim Parks represented Employer for Injury Number 03-109225[1] (date of injury June 30, 2003) and Insurer Amerisure. The Second Injury Fund is a party to the claims, but because Claimant is seeking a temporary award, the Second Injury Fund, by agreement with Claimant, chose not to participate. Mr. Larsen is not seeking a fee on the benefits sought pursuant to this award.

With respect to Injury Number 00-111966, the parties agreed that on October 6, 2000, Claimant sustained an accidental injury arising out of and in the course of employment that resulted in injury to Claimant's right shoulder. Employment, venue, and notice are not at issue. At the time of his accident, Claimant earned an average weekly wage that qualified him for the maximum rates of compensation of $599.96 for total disability benefits and $314.26 for partial disability benefits. Employer paid no temporary total disability, but did pay medical benefits totaling $3,318.30.

The issues to be determined in Injury No. 00-111966 are:

1. Is Claimant's claim barred by the statute of limitations? Regarding the statute of limitations, the parties agree that if a two-year statute applies, Employer's statute of limitations defense is valid. However, if a three-year statute of limitations applies, the claim is timely.

2. Is Claimant's current medical condition causally related to his October 2000 accident; and

3. Are the Employer and its Insurer, American Manufacturers Mutual Insurance, responsible for providing medical treatment?

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 47-year-old, right handed union floor installer. He is currently employed by Ambassador Floor Company, but had worked continuously for Employer for almost seven years prior to coming to work for Ambassador.

On October 6, 2000, Claimant was carrying a nearly 300-pound roll of material on his shoulder with a new, inexperienced co-worker, who held the roll at the rear. As the two attempted to maneuver their burden up an incline, the co-worker dropped his end of the roll. This caused Claimant's body to be jerked outward and backward. He felt like something "moved" in his shoulder.

Claimant promptly reported the incident to Employer, who sent him to BJC three days later. Doctors at BJC examined and prescribed medication for what they suspected was a pinched nerve in the neck. In follow-up two weeks later, Claimant was still in pain, and received more prescription medication with some minor treatment. An MRI of the neck was negative. He thereafter underwent an MRI of the shoulder and was referred to Dr. Phillip George. During this time of conservative treatment, Claimant continued at his regular duties.

On November 21, 2000, Dr. George conducted an examination Claimant, after which Claimant understood the cause of his problems was a partial tear in his shoulder muscle. On April 26, 2001, Dr. George provided Claimant with a cortisone injection that, according to Claimant, provided significant relief for several months. When Claimant last saw Dr. George on June 21, 2001, he was feeling well. Dr. George recommended no further treatment. Dr. George never officially released Claimant from care, but ordered follow up in six weeks, and Claimant never kept his August 2, 2001 appointment. However, Claimant testified that after the cortisone shot wore off, he started aching badly with long days and after doing intense jobs. He had difficulty with certain activities but was able to work, although it was harder and took longer. The shoulder kept him awake at night, and his hand would occasionally go numb. His shoulder had never fully recovered from the October 6, 2000 injury.

Following his October injury, Claimant continued to do his job. Claimant's duties with Employer included hauling heavy material, cutting and placing plywood, and using a three-pound mallet to hand nail multiple staples per job. Claimant also spent a good deal of time on his hands and knees patching seams and applying adhesives. When doing a laminate job, Claimant had to maneuver and pull the laminate into place, and used a 75-pound roller to adhere vinyl. Tearing out old material was also a very physical, labor-intensive job. He used several hand tools, including saws and clamps. According to Claimant's testimony, he spent 70% of his working day on his hands and knees.

Claimant requested treatment from Employer in June 2003 because his shoulder was aching. There was no one specific event that led him to request treatment. In June 2003, Claimant went to see Dr. Bassman who was of the opinion that his shoulder complaints were work related. However, Employer did not accept treatment at that time. Claimant saw Dr. Volarich on August 13, 2004. He took a history, conducted a physical exam, and recommended a cortisone injection, which, if unsuccessful, should be followed by a surgical consult. Claimant wants the treatment recommended by Dr. Volarich.

Claimant last saw Dr. George in June 2001, and sought no further treatment until he saw Dr. Bassman in June 2003. Claimant cannot pinpoint a specific incident or event in June 2003 that made things worse. Claimant takes Advil to dull his pain, and has altered the way he carries things with his right shoulder.

Medical and Opinion Evidence

The records of St. Louis Clayton Orthopedic Group, Inc. reveal that on November 21, 2000, Dr. Phillip George diagnosed a mild sprain of the rotator cuff associated with a trauma from October 6, 2000, and prescribed conservative care. One month later, Claimant's shoulder was still improving, but not fully recovered. On March 1, Claimant reported his symptoms, which had been improving, had gotten worse, but Dr. George continued conservative treatment of Celebrex and ice applications. On April 26, 2001, Dr. George administered an injection to address Claimant's persistent complaints. The injection offered complete relief for about two weeks, and on June 21, 2001, Claimant reported recurrent soreness and stiffness, particularly with overhead activities. Claimant failed to keep his August 8, 2001 appointment, and did not return thereafter to see Dr. George.

A brief record from Dr. Bassman dated June 24, 2003 indicates Claimant had ongoing shoulder problems from a workers' compensation injury years before while carrying carpet. Dr. Bassman wrote without elaboration that he believed Claimant's shoulder problem was work related.

Dr. David T. Volarich saw Claimant for a medical evaluation on August 13, 2004, and recorded a history of injury consistent with the evidence at hearing. He diagnosed a hyperextension/abduction injury of the right shoulder causing impingement as a result of the October 6, 2000 carrying accident, and aggravation of the impingement syndrome due to the alleged repetitive trauma of his continued work activities up to June 30, 2003. The carrying accident is the substantial contributing factor, or "the major event," causing the impingement, and the ongoing traumas of the work are substantial factors aggravating the impingement. Activities of daily life also contribute to the symptoms. Dr. Volarich did not feel Claimant was at maximum medical improvement, but recommended further conservative treatment and, if needed, decompression surgery.

Other Evidence

The records of the Division of Workers' Compensation entered into evidence indicate American Manufacturers filed a report of injury ("ROI") on or about October 10, 2000 for the October 6, 2000 injury. The ROI was filed electronically on

the form provided by the Division of Workers' Compensation ("DWC") on or about October 10, 2000. The ROI contained essential information identifying Claimant, had a description of the accident and injury consistent with the evidence, and specified the initial treatment consisted of level 2 treatment –"minor clinic hospital" care. However, the wage rate is listed at $10.00 per week, which is inconsistent with the stipulated wage rate. On or about July 8, 2003, Amerisure caused the filing of another ROI indicating that Claimant injured his shoulder on 10-6-2000, but was still having problems. The ROI listed the rate as $23.82 per hour and indicated no medical treatment had been provided. The DWC received the October 6, 2000 shoulder injury claim on October 31, 2003. The claim indicated Claimant's average weekly wage was at the "maximum" rate.

Two statements of Claimant given in July 2003 (Employer/Insurer Amerisure's Exhibits 2 & 3) came into evidence without objection. Claimant associated the problems he was having in 2003 with his 2000 accident, but also indicated the severity of his problems had gotten worse recently.

FINDINGS OF FACT

Based on a comprehensive review of the substantial and competent evidence of record, I hereby make the following findings of fact:

1. Claimant sustained an accidental injury to his right shoulder arising out of and in the course of his employment when, on October 6, 2000, he was carrying a heavy roll of product when his co-worker dropped his end, causing Claimant to be suddenly and violently jerked down and backwards.

2. Claimant promptly reported this injury, and Employer timely filed its ROI. The ROI contained an error in that it reported Claimant's wage rate as $10.00 per week, but otherwise contained the essential information. The box titled "Initial Treatment" and containing levels of treatment numbered 0 to 5 is sufficient to reflect the initial medical costs in a general manner. The DWC accepted the ROI on or about October 10, 2000. The only error in the ROI is the mistaken wage rate. There is no evidence to suggest this error was intended to mislead or was made for any ill purpose.

3. The claim indicated, and the parties stipulated, that Claimant earned a wage sufficient to qualify for the maximum rates of compensation for the date of injury.

4. Employer provided authorized treatment from the date of injury through June 21, 2001.

5. Claimant filed his claim for compensation for the right shoulder injury on October 31, 2003.

RULINGS OF LAW

Based on the facts found, and applying the Missouri Workers' Compensation Act to those facts, I find that Claimant's claim for compensation is barred by the statute of limitations.

I. **Claimant filed his claim beyond the time provided under §287.430.**

The applicable limitation period for filing a workers' compensation claim in Missouri depends on whether the employer timely files a report of injury ("ROI"). Section 287.430 provides in part, with emphasis added:

> [N]o proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that *if the report of the injury or the death is not filed by the employer* as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death....

Under Missouri law, statutes of limitations are favored and cannot be avoided unless the party seeking to do so acts in such a manner as to bring himself into an exception. *Stephens v. Associated Dry Goods Corp.*, 805 F.2d 812, 813 (C.A.8 (Mo.)banc 1986) *citing DeRousse v. PPG Indus., Inc.*, 598 S.W.2d 106, 111-12 (Mo.banc 1980).

Claimant filed his claim more than two years after the date of injury and the last payment made on account of the injury. However, Claimant asserts an exception exists, and that the three-year statute of limitation should apply. It is Claimant's position that the filing of a ROI containing inaccurate information is equivalent to failing to file a ROI. For the reasons set forth below, I find Claimant's argument to be without merit.

Under most circumstances, when an employer becomes aware of an injury to an employee at work, the employer is obligated to file a full and complete report of every injury with the Division of Workers' Compensation. Pursuant to §287.380:

> All reports submitted under this subsection shall include the name, address, date of birth and wages of the deceased or injured employee, the time and cause of the accident, the nature and extent of the injury, the name and address of the employee's and the employer's or insurer's attorney of record, if any, the medical cost incurred in treating the injured employee, the amount of lost work time of the employee as a result of the injury and such other information as the director may reasonably require….

The purpose of the ROI is to allow the Division of Workers' Compensation to maintain accurate and complete data on the impact of work-related injuries on the workers' compensation system. §287.380.1; *Prewitt v. Cofer*, 979 S.W.2d 521, 525 (Mo.App. E.D. 1998). The report of injury serves to notify the Division of the compensable injury, and sets in motion the Division's administrative machinery which more often than not results in prompt disposition of an injured worker's claim without his filing a formal claim for compensation. *See Trammell v. S & K Industries, Inc.* 784 S.W.2d 209, 211 (Mo.App. W.D. 1989), and rules and regulations citied therein. The failure to report an accident, by the employer, in no way prevents the injured employee from filing a claim for his injuries with the commission. The filing of a claim or a hearing thereon, by the commission, is in no way dependent upon the filing of a report of the accident by the employer. *DeRousse v. PPG Industries, Inc*., 598 S.W.2d 106, 110 (Mo.banc 1980)(Holding that under a prior version of §287.430, the statute of limitations was not tolled by the failure of employer to file a ROI). Thus, the ROI serves a statistical, not substantive, purpose.

Even if the ROI were considered a pleading necessary to prosecute a claim for compensation[2], such a minor defect could not serve to render the entire document null and void. Rate is not, and has never been an issue. Claimant pleaded, and at hearing Employer agreed, he was entitled to the maximum compensation rate allowed by law. All proceedings before the commission … shall be simple, informal and summary, and without regard to the technical rules of evidence, and no defect or irregularity therein shall invalidate the same. § 287.550, RSMo [2000], *cited in Lorenz v. Sweetheart Cup Co., Inc*., 60 S.W.3d 677, 684 (Mo.App. S.D.2001). There is currently no requirement to so strictly construe the law such that a minor error in a document nullifies the entire document.

I find Employer met its obligation under the law to file a timely report of injury following Claimant's October 6, 2000 accidental injury. Employer filed a ROI - no exception to the two-year statute of limitation exists in this case. Claimant's claim was filed out of time.

II. **The remaining issues are moot.**

Having determined the claim for benefits for October 6, 2000 work accident was not filed within the statute of limitations, and that no exception to the two-year limitation period is applicable, all other issues presented for determination are moot.

CONCLUSION

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Claimant did not file his claim within the time required by law. The claims against Employer, and the Second Injury Fund, are denied. This is a final award.

Date: _____ Made by:

_____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-109225

Employee: Thomas Brookes

Employer: Stephens Floor

Insurer: Amerisure Companies

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

Date of Accident: Alleged June 30, 2003

Place and County of Accident: Alleged Various locations

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 18, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla O. Boresi, issued July 18, 2005, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 10th day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED
William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

William F. Ringer, Chairman

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge is in error.

The administrative law judge concluded that employee failed to establish that he suffers from an occupational disease by repetitive trauma. I believe the conclusion is premature.

Employee suffered an initial injury in 2000. As indicated in my dissent in Injury No. 00-111966, I believe employee filed a timely claim in that matter for which I would issue a temporary award of further medical care. According to Dr. Volarich, employee never attained maximum medical improvement from the 2000 injury. Until the extent of disability from the 2000 injury is determined, it is impossible to determine if the conditions of employee's employment since that time were a substantial factor in aggravating the previous condition of employee's shoulder or in causing a new occupational disease of the shoulder.

I would modify the award of the administrative law judge to a temporary award denying additional medical care from employer and Amerisure Company, at this time. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

John J. Hickey, Member

AWARD

Employee: Thomas Brookes

Dependents: N/A

Employer: Stephens Floor

Additional Party: Second Injury Fund

Insurer: American Manufacturers Mutual

Hearing Date: May 10, 2005

Injury No.: 03-109225

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.

3. Was the injury or occupational disease compensable under Chapter 287? No.

3. Was there an accident or incident of occupational disease under the Law? No.

6. Date of accident or onset of occupational disease: Alleged June 30, 2003

7. State location where accident occurred or occupational disease was contracted: Various locations.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? No.

10. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant alleged to suffer from a repetitive motion disease following an accidental injury, the claim for which is barred by the statute of limitations.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: N/A

15. Nature and extent of any permanent disability: N/A

15. Compensation paid to-date for temporary disability: $0.

16. Value necessary medical aid paid to date by employer/insurer? $0.

17. Value necessary medical aid not furnished by employer/insurer? $0.

19. Employee's average weekly wages: Not determined.

19. Weekly compensation rate: $513.17 / 340.12

20. Method wages computation: By stipulation.

COMPENSATION PAYABLE

21.Amount of compensation payable:

22. Second Injury Fund liability: No

TOTAL:

23. Future requirements awarded: None.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John J. Larsen, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas Brookes

Injury No.: 03-109225

Dependents: N/A

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Stephens Floor

Additional Party: Second Injury Fund

Insurer: American Manufacturers Mutual

Checked by: KOB

PRELIMINARIES

The matter of Thomas Brookes ("Claimant") proceeded to hearing to determine which, if either, insurance company is responsible to provide additional medical benefits to Claimant for his right shoulder injury. Two separate claims alleging different theories were tried simultaneously. Attorney John Larsen represented Claimant. Attorney Juan Arias represented Stephens Flooring Company, Inc. ("Employer") in Injury Number 00-111966[3] (date of injury October 6, 2000), and Insurer, American Manufacturers. Attorney Kim Parks represented Employer for Injury Number 03-109225 (date of injury June 30, 2003) and Insurer Amerisure. The Second Injury Fund is a party to the claims, but because Claimant is seeking a temporary award, the Second Injury Fund, by agreement with Claimant, chose not to participate. Mr. Larsen is not seeking a fee on the benefits sought pursuant to this award.

With respect to Injury Number 03-109225, the parties agree that on or about June 30, 2003, Claimant was an employee of Employer and earned an average weekly wage that qualified for rates of compensation of $513.17 for total disability benefits and $340.12 for permanent partial disability benefits. Venue, notice, and timeliness of the claim are not at issue. Employer and Insurer have made no payments.

At issue are:

1. Does Claimant suffer from an occupational disease arising out of and in the course of his employment;

2. Are Claimant's job duties the medical cause of his injury and occupational disease; and

3. Are Employer and its Insurer, Amerisure Company, responsible for providing medical treatment to Claimant's right shoulder?

Claimant asserts that if his October 2000 claim is time-barred, Employer, by Amerisure, should nonetheless provide benefits because the repetitive work he did through June 2003 aggravated his injury such that he had a separate compensable claim. Amerisure asserts that just because compensation is barred by the statute of limitations does not mean Claimant is entitled to "make an end run around the problem by filing a repetitive trauma claim."

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 47-year-old, right-handed union floor installer. He is currently employed by Ambassador Floor Company, but had worked continuously for Employer for almost seven years prior to coming to work for Ambassador.

On October 6, 2000, Claimant was carrying a nearly 300 pound roll of material on his shoulder with a new, inexperienced co-worker, who held the roll at the rear. As the two attempted to maneuver their burden up an incline, the co-worker dropped his end of the roll. This caused Claimant's body to be jerked outward and backward. He felt like something "moved" in his shoulder.

Claimant promptly reported the incident to Employer, who sent him to BJC three days later. Doctors at BJC examined and prescribed medication for what they suspected was a pinched nerve in the neck. In follow-up two weeks later, Claimant was still in pain, and received more prescription medication with some minor treatment. An MRI of the neck was negative. He thereafter underwent an MRI of the shoulder and was referred to Dr. Phillip George. During this time of conservative treatment, Claimant continued at his regular duties.

On November 21, 2000, Dr. George conducted an examination of Claimant, after which Claimant understood the cause of his problems was a partial tear in his shoulder muscle. On April 26, 2001, Dr. George provided Claimant with a cortisone injection that, according to Claimant, provided significant relief for several months. When Claimant last saw Dr. George on June 21, 2001, he was feeling well. Dr. George recommended no further treatment. Dr. George never officially released Claimant from care, but ordered follow up in six weeks, and Claimant never kept his August 2, 2001 appointment. However, Claimant testified that after the cortisone shot wore off, he started aching badly with long days, and after doing certain intense jobs. He had difficulty with certain activities but was able to work, although it was harder and took longer. The shoulder was keeping him awake at night and his hand would occasionally go numb. His shoulder had never fully recovered from the October 6, 2000 injury.

Following his October injury, Claimant continued to do his job. Claimant's duties with Employer included hauling heavy material, cutting and placing plywood, and using a three-pound mallet to hand nail multiple staples per job. Claimant also spent a good deal of time on his hands and knees patching seams and applying adhesives. When doing a laminate job, Claimant had to maneuver and pull the laminate into place and would use a 75-pound roller to adhere vinyl. Tearing out old materials was also a very physical, labor-intensive job. He used several hand tools including saws and clamps. According to Claimant's testimony, he spent 70% of his working day on his hands and knees.

Claimant requested treatment from Employer in June 2003 because his shoulder was aching. There was no one specific event that led him to request treatment. Claimant went to see Dr. Bassman in June 2003 who gave an opinion that his shoulder complaints were work related. However, Employer did not accept treatment at that time. Claimant saw Dr. Volarich on August 13, 2004. He took a history, conducted a physical exam, and recommended a cortisone injection, which, if unsuccessful, should be followed by a surgical consult. Claimant wants the treatment recommended by Dr. Volarich.

Claimant last saw Dr. George in June 2001, and sought no further treatment until he saw Dr. Bassman in June 2003. Claimant cannot pinpoint a specific incident or event in June 2003 that made things worse. Claimant takes Advil to dull his pain, and has altered the way he carries things with his right shoulder.

Medical and Opinion Evidence

The records of St. Louis Clayton Orthopedic Group, Inc. reveal that on November 21, 2000, Dr. Phillip George diagnosed a mild sprain of the rotator cuff associated with a trauma from October 6, 2000, and prescribed conservative care. One month later, Claimant's shoulder was still improving, but not fully recovered. On March 1, Claimant reported his symptoms, which had been improving, had gotten worse, but Dr. George continued conservative treatment of Celebrex and ice applications. On April 26, 2001, Dr. George administered an injection to address Claimant's persistent complaints. The injection offered complete relief for about two weeks, and on June 21, 2001, Claimant reported recurrent soreness and stiffness, particularly with overhead activities. Claimant failed to keep his August 8, 2001 appointment, and did not return thereafter to see Dr. George.

A brief record of Dr. Bassman from June 24, 2003 indicates Claimant had ongoing shoulder problems from a workers' compensation injury years before while carrying carpet. Dr. Bassman wrote without elaboration that he believed the shoulder problems were work related.

Dr. David T. Volarich saw Claimant for a medical evaluation on August 13, 2004, and recorded a history of injury consistent with the evidence at hearing. He diagnosed a hyperextension/abduction injury of the right shoulder causing impingement as a result of the October 6, 2000 carrying accident, and aggravation of the impingement syndrome due to the alleged repetitive trauma of his continued work activities up to June 30, 2003. The carrying accident was is the substantial contributing factor, or "the major event," causing the impingement, and the ongoing traumas of the work are substantial factors aggravating the impingement. Activities of daily life also contribute to the symptoms. Dr. Volarich did not place Claimant at maximum medical improvement from the October 2000 injury or the aggravation, but recommended more conservative treatment and, if needed, decompression surgery.

Other Evidence

The records of the Division of Workers' Compensation entered into evidence indicate American Manufacturers filed a report of injury ("ROI") on or about October 10, 2000 for the October 6, 2000 injury. On or about the end of June, 2003, a ROI filed on behalf of Employer indicated that Claimant was carrying carpet when he was"injured on 10-6-00, states his shoulder is giving him problems because of this…"

Two statements of Claimant given in July 2003 (Employer/Insurer Amerisure's Exhibits 2 & 3) came into evidence without objection. Claimant associated the problems he was having in 2003 with his 2000 accident, but also indicated the severity of his problems had gotten worse recently.

FINDINGS OF FACT

Based on a comprehensive review of the substantial and competent evidence of record, I hereby make the following findings of fact:

6. Claimant sustained an accidental injury to his right shoulder arising out of and in the course of his employment when, on October 6, 2000, he was carrying a heavy roll of product and his co-worker dropped his end, causing Claimant to be suddenly and violently jerked down and backwards.

7. Claimant never completed treatment for his 2000 right shoulder injury, and never had a medical professional declare him to be at maximum medical improvement.

8. Claimant's right shoulder symptoms persisted from October 6, 2000 to the present, although the intensity of the symptoms waxed and waned over the years.

9. The October 6, 2000 accident is the substantial factor in Claimant's current medical condition, complaints of pain, and need for treatment.

10. The work Claimant performed following his October 6, 2000 injury could have triggered or precipitated episodes of increased symptoms, but such repetitive work is not a substantial factor in Claimant's medical condition.

RULINGS OF LAW

Based on the facts found, and the application of the Missouri Workers' Compensation Act, I find that Claimant does not suffer from an occupational disease of repetitive trauma arising out of and in the course of employment, but has an injury and disability due to an accidental injury that is not the subject of this claim.

All the evidence indicates that it is the October 6, 2000 carrying incident that is the cause of Claimant's right shoulder disability and problems. He testified as such, and the medical records and opinions support such testimony. Even Dr. Volarich identifies the October 2000 event as the substantial contributing factor, or "the major event," causing the impingement from which Claimant now suffers. However, Claimant asserts that the work he did from October 6, 2000 to June 2003 aggravated his October injury such that he sustained a new, compensable injury. Neither the law nor the facts support such a conclusion.

In order to recover for an occupational disease, Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." However, such conditions need not be the sole cause of the occupational disease, so long as they are *a major contributing factor* to the disease. As a general rule, disability sustained by the aggravation of a preexisting *nondisabling* condition or disease caused by a work-related accident is compensable even though the accident would not have produced the injury in a person not having the condition. *Kelley v. Banta & Stude Const. Co., Inc*., 1 S.W.3d 43, 48-49 (Mo.App. E.D. 1999) *citations omitted*. Section 287.020.2 provides that "an injury is compensable if it is clearly work related" and "[a]n injury is clearly work related if work was a *substantial factor* in the cause of the resulting medical condition or disability." (Emphasis supplied.) Although the phrase "substantial factor" is largely undefined, section 287.020.2 provides some guidance via this language: "An injury is not compensable merely because work was a *triggering or precipitating* factor." *Gardner v. Contract Freighters, Inc*., 2005 WL 1503699, 3 (Mo.App. S.D. 2005)(contains a excellent analysis of "substantial factor" vs. "triggering or precipitating factor").

Claimant has not established that the work he did after his accident was a substantial factor in his current medical condition. Claimant injured his shoulder in the 2000 lifting accident, and all his problems stem from that event. He was consistently symptomatic thereafter, with only minor, temporary relief provided by doctors. He never returned to a non-symptomatic or stable state. Rather, he continued to work as he always did. Although this may have triggered an increase in symptoms, there is no evidence that his post-accident work caused Claimant's preexisting condition to escalate to the level of greater disability.

Claimant suffered from the effects of an accidental injury. He does not have an occupational disease caused by repetitive trauma, and is therefore not entitled to recover benefits under this claim.

CONCLUSION

The claim against Employer is denied. The claim against the Second Injury Fund is denied. This is a final award.

Date: _____ Made by:

_____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

_____
Patricia "Pat" Secrest
Director
Division of Workers' Compensation

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[1] A separate Award is issued for this Injury Number.

[2] In the past, the ROI was viewed as a pleading, see *Tralle v. Chevrolet Motor Co.,* 230 Mo.App. 535, 92 S.W.2d 966, 970 (Mo.App.1936), and cases cited, but the law no longer gives the ROI such weight.

[3] A separate Award is issued for this Injury Number, wherein it was found that the claim was barred by the statute of limitations.